Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1994

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

VS.

RONALD BULL,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fourth and Fourteenth Amendments to the United States Constitution require that police knock and announce their identity and wait a reasonable period of time before entering when executing a legally issued search warrant.

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Pennsylvania entered in this case.

OPINIONS BELOW

The judgment of the Supreme Court of Pennsylvania has been reported at ___Pa. ___, 650 A.2d 874 (1994) and is set forth in full in Appendix A of this Petition

The Opinion of the Superior Court of Pennsylvania is reported at 422 Pa.Super.Ct. 67, 618 A.2d 1019 (1993), and is set forth in full in Appendix B of this Petition.

The Opinion of the Court of Common Pleas of Delaware County is not reported, and is set forth in full in Appendix C of this Petition.

STATEMENT OF JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on November 23, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Four, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment Fourteen, Section One, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

On October 20, 1989, at 12:20 a.m., Detective James Frey of the Delaware County Drug Task Force obtained a search warrant authorizing a night time search for Apartment C-1 East, 8115 West Chester Pike, Upper Darby Township, Delaware County, Pennsylvania. Detective Frey's Affidavit of Probable Cause stated that the reason for the night time search was, "To prevent the loss of evidence through Bull's selling the PCP and also for general safety for the public given the effect PCP has on those who use it."

Approximately one year prior to obtaining the search warrant of October 20, 1989, the same detective had executed a warrant on the same premises, seeking PCP that Bull was believed to have in his possession. This search produced no drugs, but the detective subsequently learned from Bull's wife that while police were knocking and announcing their identity and waiting for

someone to answer, Bull was successfully destroying the drugs. The detective was also aware, as he approached the door to execute the October 20, 1989 warrant, that the door to the premises was secured by five locks.

Upon arrival at 8115 West Chester Pike, Detective Frey and other police officers went to Apartment C-1 East, knocked on the door and announced, "Police. Search warrant." They waited two or three seconds then forcibly entered the apartment through the door containing five locks and a peephole.

When police had opened the door about a foot, they could see Ronald Bull on the other side with his back to the door, forcibly holding it shut. Although police continued to yell, "Police. Open the door.", Bull did not peaceably surrender the premises, and the door was forced open to gain entrance.

Once police were inside the apartment, a search was conducted pursuant to the warrant. Seized from the apartment were 29 grams of

PCP, a tally sheet, drug paraphernalia, numerous bottles of parsley flakes, numerous bottles of mint leaves, a lemon extract bottle, $341.00 United States currency, and numerous items of mail addressed to Ronald Bull at Apartment C-1 East, 8115 West Chester Pike. Bull was arrested and charged with Possession With Intent to Deliver Controlled Substances, Criminal Conspiracy, and related offenses.

On April 2, 1990, a suppression hearing was held in the Court of Common Pleas of Delaware County, based upon omnibus pre-trial motions filed by Ronald Bull. The motions were denied, and on June 7, 1990, a jury trial was held before the Honorable Charles C. Keeler in the Court of Common Pleas of Delaware County, at the conclusion of which Bull was found guilty of Possession With Intent to Deliver Controlled Substances, Criminal Conspiracy and related offenses. On February 24, 1992, Bull was sentenced to a

total term of incarceration of five to ten years and fined $25,000.00. Bull appealed this judgment of sentence to the Superior Court of Pennsylvania which, by Order and Opinion dated January 7, 1993, reversed the judgment of sentence, finding the evidence had been unlawfully seized due to a violation of the "knock and announce" rule, which the Court found to be mandated by the Fourth Amendment. That Opinion was published as Commonwealth v. Bull, 422 Pa.Super.Ct. 67, 618 A.2d 1019 (1993). The Commonwealth sought allowance of appeal to the Pennsylvania Supreme Court, which by Order dated February 10, 1994, granted appeal. On November 23, 1994, the Supreme Court, by per curiam order, affirmed the Order of the Superior Court. Mr. Justice Papadakos, joined by Justices Castille and Montemuro filed a dissenting opinion. That Opinion is published as Commonwealth v. Bull, ___Pa.___,

650 A.2d 874 (1994). The Commonwealth now seeks this Court's review.

REASONS FOR GRANTING THE WRIT

THE KNOCK AND ANNOUNCE RULE IS NOT MANDATED BY THE FOURTH AND FOURTEENTH AMENDMENTS.

The Pennsylvania Supreme Court, in affirming the Opinion of the Superior Court of Pennsylvania, has followed an established line of Pennsylvania cases which hold that the "knock and announce" rule is mandated by the Fourth Amendment. The result of this holding is that violations of the rule are deemed to be of constitutional dimension, requiring the suppression of evdience. This Honorable Court has already decided to address this issue when it granted certiorari on November 23, 1994, in Wilson v. Arkansas, cert. granted, 115 S.Ct. 571 (1994), which poses the question whether the "knock and announce" rule is constitutionally mandated by the Fourth Amendment.

This Honorable Court has never specifically held that the rule is mandated by the Fourth Amendment. However, the

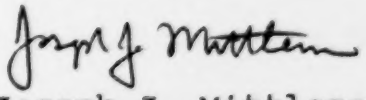
Court's ruling in Ker v. California, 374 U.S. 23 (1963), which specifically declined to address the issue, has left the several state courts and circuit courts without definitive guidance on this important issue.

This Honorable Court has already recognized that its jurisdiction is necessary to definitively resolve this issue. The arguments of the parties in Wilson v. Arkansas, supra, establish that certiorari was properly granted to determine whether the "knock and announce" rule is compelled by the Fourth Amendment. The Commonwealth of Pennsylvania respectfully requests that this Honorable Court grant certiorari in the instant case, joint this case with Wilson v. Arkansas, supra, and determine whether the "knock and announce" rule is of constitutional dimension.

CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,



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A P P E N D I X

(J-188-1994)
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Commonwealth of Pennsylvania, Appellant

v.

Ronald Bull, Appellee

No. 5 E.D. Appeal Dkt. 1994

Appeal from Order of Superior Court entered January 7, 1983, at No. 1157 Philadelphia 1992, Reversing and Vacating Judgment of Sentence of Court of Common Pleas of Delaware County, Criminal Division, entered February 24, 1992, at No. 8420-89 and Remanding case

422 Pa.Super. 67, 618 A.2d 1019 (1993)

Argued: October 18, 1994

ORDER

PER CURIAM: DECIDED: November 23, 1994

Order affirmed.

Mr. Justice Papadakos files a dissenting opinion in which Mr. Justice Castille and Mr. Justice Montemuro join.

Mr. Justice Montemuro is sitting by designation.

TRUE COPY FROM THE RECORD
Attest: December 21, 1994

/s/ CHARLES W. JOHNS, ESQ.,
Prothonotary
Supreme Court of Pennsylvania

APPENDIX A

(J-188-1994)
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Commonwealth of Pennsylvania, Appellant

v.

Ronald Bull, Appellee

No. 5 E.D. Appeal Dkt. 1994

Appeal from Order of Superior Court entered January 7, 1983, at No. 1157 Philadelphia 1992, Reversing and Vacating Judgment of Sentence of Court of Common Pleas of Delaware County, Criminal Division, entered February 24, 1992, at No. 8420-89 and Remanding case

422 Pa.Super. 67, 618 A.2d 1019 (1993)

Argued: October 18, 1994

DISSENTING OPINION

MR. JUSTICE PAPADAKOS
DECIDED: November 23, 1994

I am compelled to dissent to the entry of a Per Curiam Order of Affirmance of the Order and Opinion of the Superior Court because I fear that my colleagues are retrenching from the position they affirmed in Commonwealth v. Means, 531 Pa. 504, 614 A.2d 220 (1992), and Commonwealth v. Chambers, 528 Pa. 403, 598 A.2d 539 (1991). These cases involve the application of the knock and announce rule in the execution of a search warrant. We have repeatedly held that the knock and announce rule, as embodied in Rule 2007 of the Pennsylvania Rules of Criminal Procedure, requires the police, when executing a warrant, to knock, announce their presence and reason for being there, and give

the occupants a reasonable period of time to respond before the police are justified in making a forced entry.

There is now a serious discrepancy in the interpretation of our case law on the subject of knock and announce and it behooves this court to clarify same with an opinion. Are Means and Chambers correct or is the Superior Court panel correct in Grubb, infra?

In Means and Chambers, we reiterated the rule and listed exceptions, one of which states that "the police have reason to believe that evidence is about to be destroyed". This does not mean that the police must have reason to believe that evidence is, in fact, being destroyed at the very moment they are knocking on the door. The Superior Court has so held in Commonwealth v. Grubb, 407 Pa.Superior Ct. 78, 595 A.2d 113 (1991):

> While there is no constitutional requirement that police afford suspects a reasonable opportunity to destroy evidence, it is only when police have reason to believe the evidence is being destroyed while they wait outside the door that they may forcibly enter the premises. (Emphasis added).

The Superior Court then muddies the waters by continuing:

> In the case sub judice, there is no showing the police believed destruction of the evidence was imminent,... (Emphasis added).

407 Pa.Superior Ct. at 83, 595 A.2d at 135.

In the case sub judice, the Superior Court apparently realized the temporal inconsistency in Grubb and stated its new exception to the Rule as follows:

> To establish that exigent circumstances existed in this instance, the Commonwealth must demonstrate that the police had reason to believe that appellant was destroying evidence at the time of the announcement. Grubb, 407 Pa.Super. at 83, 595 A.2d at 135. A mere presumption that the evidence would be destroyed is not enough. See, id. at 84-85, 595 A.2d at 136 (citations omitted). ("[T]here must be more than the presumption that the evidence would be destroyed merely because it could be easily accomplished...The fact that evidence may be destroyed...does not justify the suspension of the fourth amendment.").

422 Pa.Superior Ct. 67, 618 A.2d 1019, at 1022 (1993).

In this case, the police had a history of this appellee successfully destroying evidence while they were knocking and announcing their identity. This second time around they were justified in believing that the defendant would attempt to destroy evidence while they waited a reasonable time for him to respond. Accordingly, I believe that the police have met the exception and were justified in making a forcible entry in executing the search warrant.

I believe that the Superior Court panels and my colleagues misperceive the true meaning of the exception when they deal in probabilities and use language such as "the evidence may be destroyed" if the police don't act quickly. The probability of destruction of evidence is evident in every drug case. That is not the test. The test is whether the police have a reasonable believe that the evidence will be destroyed in the next few seconds after their knock and announce. If the police can articulate the basis for their reasonable belief, then they have met the exception and may forcibly enter immediately upon knocking and announcing.

If the rule we announced in Means and Chambers, as expressed in Rule 2007, is to be abrogated and replaced with a new rule, this Court should do it affirmatively and not sub silentio in per curiam affirmances of lower court panels.

In my view, the evidence should not have been suppressed. Accordingly, I would reverse the Superior Court's order remanding for a new trial and reinstate the judgement of sentence.

MR. JUSTICE CASTILLE AND MR. JUSTICE MONTEMURO join in this Dissenting opinion.

TRUE COPY FROM THE RECORD
Attest: December 21, 1994

/s/ CHARLES W. JOHNS, ESQ.,
Prothonotary
Supreme Court of Pennsylvania

J. A42043/1992

COMMONWEALTH OF PENNSYLVANIA

V.

RONALD BULL, Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 01157 PHL 92

Appeal from the Judgment of Sentence of February 24, 1992 in the Court of Common Pleas of Delaware County, Criminal Division, at No. 8420-89.

BEFORE: KELLY, FORD ELLIOTT, AND HOFFMAN, JJ.

JUDGMENT

On Consideration Whereof, it is now ordered and adjudged by this Court that the judgment of the Court of Common Pleas of DELAWARE County be, and the same is hereby REVERSED; VACATED; AND CASE REMANDED. JURISDICTION RELINQUISHED.

BY THE COURT:

/s/ DAVID A SZEWCZAK
PROTHONOTARY

DATED: January 7, 1993

APPENDIX B

J. A42043/1992

COMMONWEALTH OF PENNSYLVANIA

V.

RONALD BULL, Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 01157 PHL 92

Appeal from the Judgment of Sentence of February 24, 1992 in the Court of Common Pleas of Delaware County, Criminal Division, at No. 8420-89.

BEFORE: KELLY, FORD ELLIOTT, AND HOFFMAN, JJ.

OPINION BY HOFFMAN, J.: FILED JAN. 7, 1993

This is an appeal from the judgment of sentence for possession of controlled substances with intent to deliver[1] and conspiracy to possess controlled substances with intent to deliver.[2] Appellant, Ronald Bull, presents the following claims:

> I. The opinion testimony of the drug enforcement officer was insufficient to make out a case of possession with intent to deliver, when there was no other indicia of delivery capacity.
>
> II. The police violated Rule 2007 in waiting but one, or two seconds after knocking and announcing their identity, authority and purpose before breaking down appellant's

---

[1] 35 P.S. §780-113(a)(30).

[2] 18 Pa.C.S.A. §903.

> door. The belief that appellant might throw the contraband out of the window is not an exigent circumstance such as to relieve the police of the Rule's requirements.
>
> III. The issuance of a night time search warrant must be supported by more than the general assertion that an alleged dealer will sell his wares until they run out - without regard to time.

Appellant's Brief at 7. For the reasons set forth below, we reverse the order of the trial court, vacate judgment of sentence and remand for a new trial.

On October 20, 1989 at 12:20 a.m., Detective James Frey of the Delaware County Drug Task Force obtained a search warrant authorizing a search of appellant's apartment. The search warrant was executed approximately one hour after its issuance. During the search, the police seized 29.01 grams of phencyclidine, .45 grams of triazolan, numerous bottles of parsley flakes and mint leaves, a lemon extract bottle, $341.00 cash, a tally sheet, other items of drug paraphernalia, and mail addressed to appellant at the address searched.

As a result of the search, on October 20, 1989, appellant was charged with possession of controlled substances,[3] possession with intent to deliver controlled substances, use of or possession with intent to use drug paraphernalia[4] and criminal

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[3] 35 P.S. §780-113(a)(16).

[4] 35 P.S. §780-113(a)(32).

conspiracy. On March 16, 1990, appellant filed a pre-trial omnibus motion. Subsequently, a suppression hearing was held on April 2, 1990, following which appellant's pre-trial motions were denied. On June 7, 1990, appellant was convicted on all charges. Post-Trial motions were filed and denied. On February 24, 1992, appellant was sentenced to five-to-ten years imprisonment for possession with intent to deliver[5] to be served concurrently with a five-to-ten year term of imprisonment for conspiracy.[6] Appellant's timely appeal followed.

I.

Appellant first contends that the evidence produced at trial was insufficient to establish beyond a reasonable doubt that appellant had the intent to deliver controlled substances. This claim is without merit.

The standard applied in reviewing a sufficiency claim is well-settled.

> We must determine whether, viewing all the evidence at trial, as well as all reasonable inferences to be drawn therefrom, in the light most favorable to the Commonwealth, the jury could have found that each

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[5]The charge of possession of controlled substances merged with the charge of possession with intent to deliver for sentencing purposes.

[6]The charge of possession of drug paraphernalia merged with the charge of conspiracy for sentencing purposes.

> element of the offense was proven beyond a reasonable doubt. Both direct and circumstantial evidence can be considered equally when assessing the sufficiency of the evidence.

Commonwealth v. French, 396 Pa.Super. 436 , 440, 578 A.2d 1292, 1294 (1990), affirmed, ___Pa.___, 611 A.2d 175 (1992).

In the instant action, Detective Frey, a qualified expert in the field of drug distribution and investigation, rendered an opinion that appellant possessed controlled substances with an intent to distribute rather than for personal use.7 Such testimony, coupled with the presence of the various items discovered on the premises, is sufficient to support a finding of intent to deliver controlled substances. See, Commonwealth v. Bruner, 388 Pa.Super. 82, 101, 564 A.2d 1277, 1286 (1989) (citation omitted) (the presence of drug paraphernalia combined with expert testimony from two detectives that the controlled substances were possessed with the intent to deliver was sufficient to establish the element of intent to deliver).

7In support of his opinion, Detective Frey testified to the following: the quantity of PCP seized by the police far exceeded the amount a user would keep for himself; the parsley and mint flakes, lemon and vanilla extract bottles, wax envelopes, plastic bags and tin foil found on the premises are frequently used to manufacture and package PCP for distribution; and the tally sheet retrieved from appellant's rear pocket is a common method of recording drug sales.

II.

Appellant next contends that the suppression court erred in failing to find that the police search violated Pa.R.Crim.P. 2007, commonly referred to as the "knock and announce" rule. We agree.

We first point out our standard of review of a suppression court's determination:

> [W]e must determine whether the factual findings are supported by the record. When it is a defendant who has appealed, we must consider only the evidence of the prosecution and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted. Assuming that there is support in the record, we are bound by the facts as are found and we may reverse the suppression court only if the legal conclusions drawn from those facts are in error.

Commonwealth v. Cortez, 507 Pa. 529, 532, 491 A.2d 111, 112 (1985) (citations omitted), cert. denied, Cortez v. Pennsylvania, 474 U.S. 950, 106 S.Ct. 349 (1985).

It has long been held that the Fourth Amendment to the United States Constitution requires the police to knock and identify themselves, announce their purpose and wait a reasonable period of time before forcible entry. Commonwealth v. Grubb, 407 Pa.Super. 78, 83, 595 A.2d 133, 135 (1991). However, this requirement is not absolute. It is well-settled that there are exigencies which

excuse compliance with the Fourth Amendment knock and announce requirement. Commonwealth v. Norris, 498 Pa. 308, 313, 446 a.2d 246, 248 (1982).

These principles are codified in Rule 2007 of Pennsylvania's Rules of Criminal Procedure. Commonwealth v. Parsons, 391 Pa.Super. 273, 278, 570 A.2d 1328, 1331 (1990); Commonwealth v. Golden, 277 Pa.Super. 180, 184, 419 A.2d 721, 723 (1980). Rule 2007 provides:

> (a) A law enforcement officer executing a search warrant shall, before entry, give, or make reasonable effort to give, notice of his identity, authority and purpose to any occupant of the premises specified in the warrant, unless exigent circumstances require his immediate forcible entry.
>
> (b) Such officer shall await a response for a reasonable period of time after his announcement of identity, authority and purpose, unless exigent circumstances require his immediate forcible entry.
>
> (c) If the officer is not admitted after such reasonable period, he may forcibly enter the premises and may use as much physical force to effect entry therein as is necessary to execute a search.

Pa.R.Crim.P. 2007.

In the case at bar, the police failed to give appellant an opportunity to respond to

their knock and announcement. Upon arriving at appellant's residence, the police knocked on the door, and announced that they were police officers and that they had a search warrant for the premises. After approximately one or two seconds, the police forcibly entered appellant's apartment. While the police did not knock and announce their identity, authority and purpose before forcing entry, it is clear that they failed to wait a reasonable time for appellant to respond. See Commonwealth v. Means, No. 51 W.D. Appeal 1990, slip op. at 5 (Pa. Sept. 16, 1992) ("A five to ten second delay is not a reasonable time for an occupant to respond to police officers' knocking and announcing their purpose."); Commonwealth v. McDonel, ___ Pa.___, ___, 601 A.2d 302, 307 (1991) (A thirty second lapse between the first knock and the use of a battering ram and a five second lapse between announcement and entry was insufficient.). Hence, unless there were exigent circumstances, the search was in violation of Rule 2007.

Our Supreme Court has recognized four specific instances where exigent circumstances exist:

> 1) [where] the occupants remain silent after repeated knocking and announcing;
>
> 2) [where] the police are virtually certain that the occupants of the premises already know their purpose;
>
> 3) [where] the police have reason to believe that an announcement prior to entry would imperil their safety; and

> 4) [where] the police have reason to believe that evidence is about to be destroyed.

Commonwealth v. Means, No. 51 W.D. Appeal 1990, slip op. at 4-5 (Pa. Sept. 16, 1992) (citations omitted). In the case at hand, the Commonwealth argues that the police had reason to believe that evidence was about to be destroyed and, therefore, exigent circumstances were present at the time of the search. We do not agree.

To establish that exigent circumstances existed in this instance, the Commonwealth must demonstrate that the police had reason to believe that appellant was destroying evidence at the time of the announcement. Grubb at 83, 595 A.2d at 135. A mere presumption that the evidence would be destroyed is not enough. See id. at 84-85, 595 A.2d at 136 (citations omitted) ("[T]here must be more than the presumption that the evidence would be destroyed merely because it could be easily accomplished...The fact that evidence may be destroyed...does not justify the suspension of the fourth amendment.").

The instant case is distinguishable from Commonwealth v. Pugh, 223 Pa.Super. 112, 296 a.2d 864 (1972) and Commonwealth v. Dial, 445 Pa. 251, 285 A.2d 125 (1971), cases in which our courts have found the police justified in believing that evidence was being destroyed at the time of the knock and announcement. In Commonwealth v. Pugh, this court held that as the wife of appellant lied about being alone after the police rang the door bell and announced their identity and purpose, "the officers could reasonably conclude that she was stalling for time in order to destroy the narcotics." Pugh at 116, 296 A.2d at 866. In Commonwealth v. Dial, after the police

announced that they heard a warrant and requested that someone open the door, they heard the sound of running from inside the apartment. Dial at 254, 285 A.2d at 127. In affirming the judgment of sentence, the Supreme Court held that the sounds of running, after the door remained closed, substantiated the officers' belief that an effort was underway to destroy the evidence. Id. at 255, 285 A.2d at 127.

In the case at bar, the police knocked on the door, announced that they were police officers and stated that they had a warrant. After a second or two, the police struck the door with a sledge hammer and gained entry into appellant's apartment. Unlike the circumstances of Pugh and Dial, here the police had no communication with any individuals in the apartment and heard no sounds or movements from within. The police witnessed nothing during the actual execution of the search warrant to put them on notice of destruction of evidence.

Rather, the Commonwealth bases its assertion upon testimony regarding appellant's actions during a prior search. Specifically, the police testified that in 1987 or 1988, a search warrant was executed upon the same residence as in the instant case. Approximately six months after the search, appellant's wife told the police that before the police had entered the apartment, appellant threw a package of drugs out of the window. Appellant later retrieved the package. It is from this instance alone that the police substantiate their immediate entry into appellant's apartment.

In Commonwealth v. McDonel, ___ Pa. Super___, 601 A.2d 302 (1991), the Commonwealth provided a similar basis to

justify the police's failure to provide appellant with an opportunity to peacefully surrender the premises. Specifically, the Commonwealth argued that:

> [T]he officers' knowledge of appellant's two-year-old weapons violation combined with their "assumptions" that drug dealers routinely "possess firearms and that such weapons are as much tools of the trade as more commonly recognized drug paraphernalia" was sufficient to create the exigent circumstances necessary to permit forced entry without first affording appellant the opportunity to surrender the premises peaceably.

Id. at ___, 601 A.2d at 305.

This court found that the officers were not warranted in their belief that appellant was armed and dangerous at the time the search warrant was executed. We stated that:

> [T]he present case was not one where...the officers were poised to arrest an escaped convict who was recently seen with a handgun and who had previously been convicted of a murder which he committed with a firearm. In the case sub judice, all the officers knew was that appellant had pleaded guilty to possession of an unlicensed weapon some two years earlier. Certainly, such information is stale at best.

Id. at ___, 601 A.2d at 306.

In the present action, the police merely had knowledge of a one-to-two year old search of appellant's apartment where appellant allegedly abandoned evidence which he later retrieved. There was no contention that

appellant actually destroyed any evidence during the prior search. Hence, the most the police could infer from the prior search is that appellant might attempt to conceal evidence during future searches.

Since the police failed to afford appellant a reasonable opportunity to respond and there were no exigent circumstances, we find that the police violated Rule 2007 in executing the search warrant. Hence, the search was unlawful and the evidence resulting from the search should have been suppressed. Commonwealth v. Means, No. 51 W.D. Appeal 1990, slip op. at 5-6 (Pa. Sept. 16, 1992). Accordingly, we reverse the order of the trial court, vacate judgment of sentence, and remand for a new trial.[8]

Reversed; judgment vacated; and case remanded. Jurisdiction relinquished.

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[8]Because we reverse the trial court and vacate judgment of sentence, we need not address appellant's third claim.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA
VS.
RONALD BULL

NO. 8420-89

James F. Mattera, Jr., Esq., Attorney for Commonwealth
John G. McDougall, Esq., Attorney for Defendant

O P I N I O N

KEELER, J. FILED:

The defendant was convicted of various violations of Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act and criminal conspiracy after trial before a jury on June 7, 1990. Post-verdict motions were timely filed by counsel and later supplemented by the defendant.

It should be noted that a suppression hearing was held by The Hon. Anthony R. Semeraro of this Court before the case was transferred to this judge for trial. Judge Semeraro heard testimony and rejected defense counsel's contention concerning suppression of evidence. This Court had the opportunity to review the transcript of that hearing in disposing of defendants post-verdict motion which challenged Judge Semeraro's disposition of the suppression issues.

Defense counsel's first contention challenges the propriety of the issuance of a night-time search warrant based upon the information outlined in the affidavit of

probable cause submitted to the search warrant's issuing magistrate. Previously, this Court addressed an analogous issue at length in holding that information justifying the issuance of a night-time search warrant required the articulation of specific facts which would justify a night-time intrusion. See Commonwealth v. Mourar, 71 Del.Cty.Rep. 67 (1983), rev'd 332 Pa.Super. 258, 481 A.2d 352 (1984). The Superior Court reversed this Court's decision and found that the failure to secure a search warrant which specifically permitted a night-time search did not involve an issue rising to constitutional dimensions which would justify suppression. Id. Given this judicial gloss, Judge Semeraro's decision fell well within the state of the law as it currently stands. Certainly, the issuance of the warrant was based on facts which established probable cause for a search. Moreover, in this particular case, the affidavit of probable cause specifically cited protection of society at large from those who might use the controlled substance being sought. The combination of facts establishing probable cause for the search and the need to protect society suggested an imperative which required immediate nighttime action.

Defense counsel also posits the method of entry in this case as a transgression of the bounds of the Fourth Amendment. The officer charged with supervising the execution of this search warrant, Detective Frey, testified that he waited several seconds before employing force to enter the premises. His testimony was candid - he noted that he heard nothing after he announced the presence of the police and their purpose. However, after waiting a few moments, he decided to "take the door" as the previous execution of a search warrant resulted in contraband being thrown out the windows of the premises. N.T. 4/2/90 at 71-

72. As such, the police had justifiable reason to forcibly enter after a brief wait.

The defendant's own supplementary post-trial motion suggests that the search warrant itself was defective due to a lack of details which would establish the trustworthiness of the confidential informant who provided information which led to the warrant's issuance. A review of the affidavit contains numerous detailed references to meetings with the confidential informant. Many of these meetings resulted in the communication of information which was corroborated by subsequent police investigation. Such corroboration occurred in connection with this particular investigation where the confidential informant advised the police that the defendant was processing and packaging PCP at defendant's residence. Soon thereafter, the affiant observed two individuals meet with Allison Bull in the parking lot at defendant's residence. These individuals were stopped and PCP was discovered in their possession. This corroborated the confidential informant's information and suggested that the confidential informant had access to the suspect which, in turn, substantiated the confidential informant's reliability. Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). Moreover, the confidential informant's declarations included references which were against the informant's own penal interests. See Commonwealth v. Mazzochetti, 299 Pa.Super. 447, 455, 445 A.2d 1214, 1218 (1982).

The challenge to this confidential informant's reliability on the grounds that the affidavit or probable cause contained few details concerning prior arrests or convictions based on the informant's previous communications, or that the affiant had personal knowledge of such matters, lacks

merit. While the court may consider this as a factor in assessing probable cause for the search warrant's application, it is not determinative. The court must analyze the "totality of the circumstances" surrounding the confidential informant's reliability. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); Commonwealth v. Gray, 509 Pa. 476, 484, 503 A.2d 921, 925 (1986).

Counsel's last argument suggests that the Commonwealth lacked sufficient evidence to support a conviction for intent to deliver controlled substances. Detective Frey was qualified and testified as an expert in the field of drug distribution and investigation. He reviewed the items found on the premises and their particular uses with respect to the packaging and distribution of controlled substances, specifically PCP. He also related the quantity of controlled substances seized. Using this information he rendered an opinion based upon his training and previous experience that the defendant possessed controlled substances with an intent to distribute them, rather than personal use. Such testimony, combined with the presence of the various items discovered on the premises, is consistent with a finding of intent to deliver. See Commonwealth v. Bruner, 388 Pa.Super. 82, 564 A.2d 1277 (1989). When viewed as we must, in a light most favorable to the Commonwealth as the verdict winner, we see that defendant's position with respect to sufficiency of the evidence is untenable. See Commonwealth v. Kale, 331 Pa.Super. 155, 480 A.2d 291 (1984).

For the foregoing reasons, the defendant's post-trial motions must be DENIED.

BY THE COURT:

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CHARLES C. KEELER J.